IN THE

Supreme Court of the United States

October Term, 1950.

No. 478

CHARLES F. BRANNAN, Secretary of Agriculture, *Petitioner*,

v.

ROBERT D. EDDY AND GERTRUDE CRAWFORD FORMAN,
Respondents.

No. 474

ROBERT D. EDDY AND GERTRUDE CRAWFORD FORMAN,
Petitioners,

v.

CHARLES F. BRANNAN, Secretary of Agriculture,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

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INDEX

CITATIONS.

Cases:

STATUTES:

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On Cross-Writs of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE PETITIONERS.

OPINIONS BELOW.

The opinion of the District Court (R. 72) is not reported. The opinion of the Court of Appeals for the District of Columbia (R. 88) is reported at 184 F. 2d 219.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 15, 1950, reversing the judgments of the District Court (R. 96). The petition for rehearing of the appellee Secretary of Agriculture, together with the petition of appellants Elder and Furman for modification of the opinion and judgment, were denied on October 2, 1950 (R. 100). The Secretary requested further stay of the mandate, and such stay was later extended to December 30, 1950. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CROSS-WRITS OF CERTIORARI.

On February 26, 1951, this Court granted a writ of certiorari in No. 473 and also in No. 474. In No. 473 the Secretary petitioned for certiorari, seeking reversal of the judgment of the Court of Appeals. In No. 474 Elder and Furman petitioned for certiorari, seeking relief from that portion of the judgment below which was adverse to them and to enlarge their rights thereunder.

STIPULATIONS.

The separately filed cases of plaintiffs Elder and Furman were consolidated for hearing in the District Court (R. 84) which, before answers, granted the motions of the Secretary for summary judgment on June 22, 1948 (R. 74-75). Plaintiffs appealed, and the cases were briefed and argued together before the Court of Appeals December 7, 1949 (R. 88). The consolidated record on appeal has been designated and agreed upon by all parties (R. 83, 102) with the accompanying stipulation that the material facts in each case are substantially identical and involve identical questions of law (R. 84-85), and that the matters alleged, considered, determined, filed, and done concerning the plaintiff [petitioner] Robert D. Elder shall with like effect be deemed the matters alleged, considered, determined, filed, and done concerning the plaintiff [petitioner] Greene Chandler Furman (R. 85).

Pursuant to such stipulations and to avoid repetitive tautology, the word "petitioner" or the word "plaintiff", where used alone in this Brief, refers to "each of the petitioners" or "each of the plaintiffs".

QUESTIONS PRESENTED.

1. Whether Civil Service Commission regulations for reduction in force—insofar as such regulations grant to nonveteran employees "according to tenure of employment" [under subgroups A-2, A-4] superior retention preference rights over veterans' preference employees whose efficiency ratings are "good" or better [subgroups B-1, C-1]—are inconsistent with and in violation of retention preference rights secured to such veterans under §§ 2, 12, 14, and 18 of the Veterans' Preference Act of 1944 and/or rights possessed by such veterans under the proviso of § 4 of the Act of August 23, 1912, and under § 3 of the Act of August 15, 1876, as such rights are broadened, and in no respect narrowed, by the Veterans' Preference Act of 1944, and embodied in the Act of 1944.

2. Whether agency action in a reduction in force in a Federal Department in the District of Columbia—whereby veterans' preference employees whose efficiency ratings are "good" or better in civilian positions of Attorney, Grade P-3, are discharged effective June 30, 1947, while other nonveteran nonpreference employees are retained in such positions of Attorney, Grade P-3, in preference to such veterans "according to tenure of employment"—is in violation of retention preference rights of such veterans under applicable statutes aforesaid.

3. Whether agency action in a reduction in force in a Federal Department in the District of Columbia—whereby veterans' preference employees whose efficiency ratings are "good" or better in civilian positions of Attorney, Grade P-3, are dropped and excluded from duty since June 6, 1947, while nonveteran employees are retained continu-

ously on active duty in such positions of Attorney, Grade P-3,—is in violation of rights of such veterans under applicable statutes aforesaid.

4. Whether the above-described discharge, dropping, and/or exclusion from duty is to be regarded as in direct violation of the proviso of § 4 of the Act of August 23, 1912, and/or of the proviso of § 3 of the Act of August 15, 1876.

5. Whether, in such a reduction in force, §§ 2, 12, and 18 of the Veterans' Preference Act of 1944 require that any veterans' preference employee whose efficiency rating is "good" or better in a position of Attorney, Grade P-3, shall be retained in preference to any nonveteran employee in such a position of Attorney, Grade P-3, without regard to tenure of employment and length of service as between such veteran and nonveteran, and without regard to the efficiency rating of the nonveteran.

6. Whether, if the material allegations in the record remain substantially as they are, the District Court should enter summary judgments to the effect that since June 6, 1947, each of these veteran petitioners has been wrongfully denied his statutory right to be retained on active duty in his position of Attorney, Grade P-3, and is entitled to reinstatement therein as of June 6, 1947.

7. Whether, if the material allegations in the record remain substantially as they are, the District Court should enter summary judgments to the effect that since June 30, 1947, each of these veteran petitioners has been wrongfully denied his statutory right to be retained on active duty in his position of Attorney, Grade P-3, and is entitled to reinstatement therein as of June 30, 1947.

8. Whether, if the material allegations in the record remain substantially as they are, the District Court should enter summary judgments to the effect that each of these petitioners has been entitled since August, 1944, to the tenure of employment designated as permanent or classi-

fied (competitive) civil service status, and that such tenure and status has been wrongfully denied him.

9. Whether veterans' preference employees are entitled to reinstatement in civilian positions as of October 28, 1947, by reason of violation of their right to *preference in reinstatement* under Section 2 of the Veterans' Preference Act of 1944—as held by the Court of Appeals (R. 93-95).

10. Whether veterans' preference employees whose efficiency ratings are "good" or better are entitled to reinstatement in civilian positions as of June 6, 1947, by reason of violation of their right to *preference in retention* under Sections 2, 12, 14, and 18 of the Veterans' Preference Act of 1944.

STATUTES AND REGULATIONS INVOLVED.

Are set out in SUPPLEMENT, p. 61.

STATEMENT.

Petitioners were honorably discharged from the United States Army after wartime service on active duty in the Infantry—Elder during World War I and Furman during World War II (R. 3, 50, 77).

Furman was appointed by respondent July 26, 1943 (R. 77) and Elder on August 2, 1943 (R. 3, 50); and from these respective dates each of the petitioners was continuously employed in a civilian position of Associate Attorney, Grade P-3, in the Office of the Solicitor, Department of Agriculture, at Washington, D. C., and each of them had at all times efficiency ratings or "good" or better (R. 3, 50, 78).

The word "petitioner", as hereinafter used, refers to "each of the petitioners". Stipulation, p. 3, *supra*.

Petitioner was one of 14,000 lawyers who took and one of 2,000 who passed the competitive civil service examinations, written and oral, given in September, 1942, and January, 1943, for Attorney positions in the classified civil service

(R. 15-16, 56-57, 77-78), and as a result was placed on the register of eligibles, certified for probational appointment, and appointed from the register by the respondent (R. 56-57). Petitioner satisfactorily completed his probationary year in such position of Attorney, Grade P-3, in the classified civil service and was officially notified in August, 1944, of his satisfactory completion thereof (R. 16, 50, 3).

On May 1, 1947, petitioner received written notice of "Conversion to Excepted Appointment (Schedule A-1-4)" (R. 78).

On May 29, 1947, petitioner received written notice dated May 29, 1947, stating:

> "A reduction in force brought about by lack of funds necessitates your being separated effective on or after June 30, 1947, c.o.b. Your last day of active duty in your present position will be June 6, 1947" (R. 4, 8, 51).

On *July* 30, 1947, petitioner received "formal notification of your separation due to reduction in force effective June 30, 1947" (R. 60, 46).

Since June 6, 1947, petitioner has been dropped and excluded from duty in his position of Attorney, Grade P-3, while five women and three men, all nonveterans without veterans' preference, have been retained by respondent in continuous employment on active duty in such positions of Attorney, Grade P-3, since June 6, 1947 (R. 48, 50-51, 23-24). The petitioner's position has not been abolished, but has been filled by such other nonveteran Attorneys, Grade P-3, who since June 6, 1947, have been continuously performing work, functions, and duties which were formerly performed by petitioner (R. 50-51, 14).

Nonveterans retained

A few days after May 29, 1947, the eight nonveteran Attorneys, Grade P-3, above referred to as retained in preference to petitioner, were each carried on respondent's records as "(1) Without veteran preference with efficiency

rating of 'good' or better. (2) Serving under an appointment with the equivalent of permanent competitive status in the classified civil service."—and were assigned *"according to tenure of employment"* to the retention subgroup A-2 of the regulations (R. 48, 51).

At the same time, the petitioner was carried on the respondent's records as "(1) With veteran preference with efficiency rating of 'good' or better. (2) Serving under an appointment for the duration of the war and six months thereafter."—and assigned *"according to tenure of employment"* to the inferior retention subgroup B-1 (R. 48, 38-39).

Nonveterams reinstated

Soon after the reduction in force said to have been due to lack of funds six (6) other nonveteran Attorneys—four women and two men who were in the still lower retention subgroup B-2 and who had been released at the same time as the petitioner—were put back to work by respondent and each of these nonveterans was thereafter steadily employed on active duty with pay in a position of Attorney, Grade P-3, in said Washington office of the Office of the Solicitor, Department of Agriculture, Washington, D. C. (R. 52-54, 48). According to allegations: "The employment and continuation in employment by defendant of said six Attorneys, Grade P-3, subgroup B-2, while defendant excluded plaintiff therefrom, was itself in violation of this plaintiff's superior rights to continued employment under Sections 2 and 12 of the Veterans' Preference Act of 1944, and under Section 4 of said Act of August 23, 1912" (R. 53). Each of the aforesaid six nonveteran Attorneys, Grade P-3, in subgroup B-2, is expressly named by the allegations (R. 52) which are set out at length by the Court of Appeals in footnote 5 of its opinion (R. 93-96).

Petitioner sued as a plaintiff in District Court June 5, 1947, to enjoin his exclusion from active duty after close of business June 6, 1947 (R. 2, 76, 7, 82). Failing in that, he

filed amended complaint June 24, 1947 (R. 13-28) and amended and supplemental complaint March 8, 1948 (R. 49-58) seeking judicial declaration and enforcement of (1) his right to preference in retention, (2) his right to preference in reinstatement, and (3) his right to classified (competitive) civil service status. The District Court granted the Secretary's motion for summary judgment before answer (R. 74), stating in its opinion: "It seems clear that plaintiff was a war service appointee and did not have permanent Civil Service status. His separation was effected in full compliance with the applicable statutes and regulations." (R. 72).

On appeal, the Court of Appeals adhered to the same general thesis (R. 90-92), expressly approving the classifications and the subgroups of the regulations for reduction in force (R. 91), and holding that "since the appellant [petitioner] was a war service appointee with an efficiency rating not less than 'good', he was properly classified in group B and subgroup B-1, a status which gave him the highest preference for retention among all war service appointees whenever a reduction in force became necessary." (R. 92).

However, the Court of Appeals reversed the judgments below (R. 96-97), ruling that petitioners' rights to the specific preference in reinstatement under Section 2 of the Act of 1944 were violated (R. 93), that the undenied allegations charge wrongful discrimination against the petitioner veterans "in the reinstatement of nonveterans in October, 1947" (R. 94), and that on October 27, 1947, both respondents were wrongfully denied reinstatement (R. 95).

§ 20.3 of the Civil Service Commission regulations (12 F.R. 2850; 5 Code Fed. Regs. § 20.3 Supp. 1947), set out at length by the Court of Appeals in footnote 4 of its opinion (R. 91-93), provides:

> "§ 20.3 *Retention preference; classification.* For the purpose of determining retention preference in reductions in force, employees shall be classified according

to tenure of employment in competitive retention groups and subgroups as follows: * * * "

Group A: All employees with equivalent of permanent or Classified civil service tenure.

Group B: All employees serving under appointments limited to the duration of the present war, or otherwise limited to a period in excess of one year.

Group C: All employees serving under appointments limited to one year or less.

Each Group, in turn, is subdivided into four subgroups

A-1. With veteran preference unless efficiency rating is less than "Good".

A-2. Without veteran preference unless efficiency rating is less than "good".

A-3. With veteran preference where efficiency rating is less than "Good".

A-4. Without veteran preference where efficiency rating is less than "Good".

B-1. With veteran preference unless efficiency rating is less than "Good".

B-2. Without veteran preference unless efficiency rating is less than "Good". * * *

In case of a reduction in force the regulations require (§ 20.8) that within each "competitive level" [e.g. "Attorney, Grade P-3] employees shall be released by starting with the lowest subgroup, C-4, and proceeding upward in inverse order—C-4, C-3, C-2, and so on, releasing all employees in each lower subgroup before proceeding to the next higher subgroup, *et seq.*

SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals for the District of Columbia erred:

1. In holding that it does not appear that petitioners' preferential right to be retained was directly violated. (R. 92).

2. In failing to hold that it appears from the undenied allegations that the petitioners' right to preference in retention has been violated during all times since June 6, 1947.

3. In holding that petitioners' preference does not arise from the proviso of § 4 of the Act of 1912 because the application of that section is confined by its terms to those having classified civil service status (R. 91).

4. In failing to hold that, in such a reduction in force, Sections 2, 12, and 18 of the Veterans' Preference Act of 1944 require that any veterans' preference employee whose efficiency rating is "good" or better in a position of Attorney, Grade P-3, shall be retained in preference to any nonveteran employee in such a position of Attorney, Grade P-3, without regard to tenure of employment and length of service as between such veteran and nonveteran, and without regard to the efficiency rating of the nonveteran.

5. In holding that: "Those classifications and the subgroups into which they were divided, which are reproduced below*, were approved by us in the *Hilton* case. We do not read the Supreme Court's opinion in *Hilton* v. *Sullivan*, 334 U. S. 323 (1948), as holding to the contrary." (R. 91).

6. In holding that each petitioner "was properly classified in Group B and subgroups B-1, a status which gave him the highest preference for retention among all war service [tenure] appointees whenever a reduction in force became necessary." (R. 92).

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* Referring to the entire text of § 20.3 of the CSC regulations for reductions-in-force.

7. In failing to hold that the Civil Service Commission regulations for reduction in force—insofar as such regulations grant to nonveteran employees "according to tenure of employment" [as under subgroups A-2 and A-4] superior retention preference rights over veterans' preference employees whose efficiency ratings are "good" or better [as in subgroups B-1 and C-1]—are inconsistent with and in violation of retention preference rights secured to such veterans under Sections 2, 12, 14, and 18 of the Veterans' Preference Act of 1944 and/or rights possessed by such veterans under the proviso of § 4 of the Act of August 23, 1912, and under § 3 of the Act of August 15, 1876, as such rights are broadened, and in no respect narrowed, by the Veterans' Preference Act of 1944, and embodied in the Act of 1944.

8. In holding that "throughout the period of his employment he [petitioners] was a war service appointee with tenure limited to the duration of the war and a period of six months thereafter". (R. 90-91).

9. In holding that petitioners were and are without classified civil service status (R. 91).

10. In failing to hold that in August, 1944, classified (competitive) civil service status inured to each of the petitioners as a matter of law by reason of the competitive examinations and procedures duly authorized and given effect with respect to petitioners under Sec. 17.8 *Registers of eligibles* (adopted January 30, 1948, 8 F. R. 2141); id. Sec. 17.6 *Registers of eligibles* (repromulgated April 21, 1943, in compendium, 8 F. R. 5207-5208), of the Regulations of the Board of Legal Examiners; under Executive Order No. 8743 of April 23, 1941 (6 F. R. 2117); under authority of the "Ramspeck Act" of November 26, 1940, 54 Stat. 1211, 5 U. S. C. 631(a), and the Civil Service Act of January 16, 1883, c. 27, 22 Stat. 403, 5 U. S. C. § 632 et seq. (R. 15-16, 55-57).

11. In failing to hold that, if the material allegations in the record remain undisproved, each of the petitioners is entitled to the relief prayed for in his amended and supplemental complaint.

12. In failing to hold that each of the petitioners has been unlawfully excluded from duty and pay in his position of Attorney, Grade P-3, during all times since June 6, 1947.

13. In failing to hold that the respondent was without authority to impose a limitation "for the duration of the present war and for six months thereafter", or any other time limitation, with respect to the appointment of each of the petitioners to his Attorney position.

14. In failing to hold that, in making any appointment of these petitioners to such Attorney positions in the classified civil service, the respondent was legally required to make, and must be deemed to have made, a probational appointment of each of the petitioners thereto.

15. In failing to hold that during all times after the month of August, 1944, each of the petitioners has been lawfully entitled to permanent civil-service tenure of employment and classified (competitive) civil service status as an employee in the Government service, and lawfully entitled to all rights, privileges, and immunities appertaining to such status.

16. In holding that the appointment of attorneys subsequent to March 16, 1942, was governed by § 17.1(g) of the Regulations of the Board of Legal Examiners (5 Code Fed. Regs. § 17.1, Cum. Supp. 1943). (R. 90).

17. In holding that: "Since the foregoing [§ 17.1(g)] was the regulation in effect at the time the appellant [peti-

tioners] was appointed, his acceptance of employment necessarily was subject to the terms thereof." (R. 90).

18. In failing to hold that both § 17.1(g) and the original § 17.2(g) *Procedure prior to the establishment of registers* (adopted March 16, 1942, 7 F. R. 2201; repromulgated in compendium April 21, 1943, 8 F. R. 5207-5208; 5 Code Fed. Regs. 17.1 Cum. Supp. 1943) were inapplicable, unauthorized, and a nullity.

19. In failing to hold that the eight days notice delivered to petitioners May 29, 1947, of the proposed action of excluding them from duty in their positions from and after June 6, 1947, was in violation of Section 14 of the Veterans' Preference Act of 1944, mandatorily requiring thirty days notice of such action, and that such notice was consequently *void ab initio* and all action pursuant thereto illegal and void.

20. In failing to hold that, all Attorney positions and appointments in the classified (competitive) civil service having been converted to excepted appointments and excepted from competitive status and the Civil Service Act and Rules pursuant to Schedule A of the new Civil Service Rules effective May 1, 1947, the release of petitioners was in violation of statute *and* of the Civil Service Commission regulations for reduction-in-force.

21. In failing to hold that Attorney positions have remained in the classified (competitive) civil service and subject to the Civil Service Act and Rules at all times since the issuance of Executive Order No. 8743 of April 23, 1943.

SUMMARY OF ARGUMENT.

Whether or not possessed of classified (competitive) civil service status, each of the petitioner veterans was wrongfully denied his statutory right to preference in retention and has been wrongfully excluded from duty and pay in his position of Attorney, Grade P-3, during all times since June 6, 1947. (R. 50-51, 14).

Each of the petitioners was entitled to probational appointment in an Attorney position in the classified civil service by reason of the competitive examinations and competitive procedure duly authorized and given effect with respect to him under the Civil Service Act of 1883, the Ramspeck Act of November 26, 1940, Executive Order No. 8743 of April 23, 1941, and Sec. 17.8 and Sec. 17.6 *Registers of eligibles* of the Regulations of the Board of Legal Examiners adopted January 30, 1943, repromulgated in compendium April 23, 1943. (R. 55-57).

Petitioners were each placed on the register of eligibles established in February, 1943, were certified for probational appointment by publication of the register, and were appointed from the register by respondent by reason of the authority aforesaid. (R. 56-57).

Under such authority the respondent was legally required to make and must be deemed to have made a probational appointment of each of the petitioners from the register of Attorney eligibles under which petitioners were mandatorily certified (§ 17.8, §17.6, *supra*) for probational appointment to such Attorney positions in the classified civil service.

Each of the petitioners successfully completed his probationary period of one year in August, 1944, was officially notified thereof by respondent, and during all times thereafter a classified (competitive) civil service status or permanent civil-service tenure of employment inured to each of the petitioners as a matter of law. Effect is thus given to the steps prescribed in the Civil Service Act and implementing Executive orders and regulations. (R. 16, 50, 3).

ARGUMENT.

I.

Petitioner's Right to Preference in Retention Was Violated and Wrongfully Denied Since June 6, 1947.

1. The regulation accords no appropriate meaning to the vital proviso of Section 12.

The first part of the second proviso of Section 12 of the Veterans' Preference Act of 1944 provides:

> "* * * *Provided further,* That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees * * *"

It is the Commission's preoccupation with and fixation upon the first clause of Section 12, as comprising the sole Congressional mandate with respect to veterans' preference in retention, which has resulted in the creation of a regulation out of harmony with the statute. The first clause of Section 12 of the Veterans' Preference Act of 1944 provides:

> "Sec. 12. In any reduction of personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: * * * " (58 Stat. 390, 5 U. S. C. § 861.

From all that appears, the Commission read the first clause, *supra,* and stopped reading at the impact of the first colon. Like Dante's interrupted lovers at Rimini, the Commission closed the book and read no more that day—or ever.

The Commission's 1947 reduction-in-force regulation leads off and follows through by giving paramount overall effect and retention value to the first factor of the gen-

eral terms of the first clause—*"tenure of employment"*—by setting up retention Groups A, B, and C, *"according to tenure of employment"*. The regulation provides:

> "§ 20.3 *Retention preference; classification.* For the purpose of determining retention preference in reductions in force, employees shall be classified according to tenure of employment in competitive retention groups and subgroups, as follows: * * *" (12 F. R. 2850).

The overall effect thus given to the first term of the first clause covers the retention rights of *all* Federal employees —including all the proviso-preferred, proviso-excepted class of veterans, as well as all the nonveteran employees without veterans' preference.

As applied herein, the regulation then attempts to give "due effect" to the four factors or terms of the first clause of Section 12 of the Act of 1944, by first segregating *all* the veteran and nonveteran Attorneys, Grade P-3, in a "competitive level" so designated, who are then "classified according to tenure of employment" among the three overall retention Groups A, B, and C.

"Tenure of employment" is thus given effect as the *overall and paramount criterion* for retention priority by Groups A, B, and C.

Group A. *Permanent or classified tenure of employment* is given supreme effect as the *highest value* in the scale of retention priority, under Group A.

Group B. *War service tenure,* under Group B, and

Group C. *Temporary tenure,* under Group C, follow in descending order of lower retention values.

"Military preference"—under the mis-appellation "Veteran Preference"—is given a very secondary effect and inferior retention value as a sort of minor abscissa within and subordinated to the overall and paramount criterion

of "tenure of employment", e.g. subgroups A-1, A-3, B-1, B-3, C-1, C-3.

"*Efficiency ratings*" are given a staggered abscissa value conjointly with "military preference".

"*Length of service*" is given effect within the subgroups by remote control from § 20.2(b) of the regulations.

The closest scrutiny fails to reveal that any retention value is accorded to *veterans' preference in retention* other than the secondary and minor abscissa value assigned to it in the place and stead of the second term of "*military preference*" in the first clause of Section 12. As above stated, veterans' preference in retention is thus subordinated within and far below the overall and paramount value assigned to the first term of "tenure of employment" in the first clause of Section 12.

But Congress did not stop enacting where the Commission stopped reading and stopped giving effect. The Congress went on to enact the significant part of the section:

> "* * * Provided further, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees * * *"

The closest scrutiny fails to reveal that the seriatim classification scheme of § 20.3, *supra*, takes into account in any way this applicable proviso which, as this Court has recognized, is "the heart of the section". *Hilton* v. *Sullivan*, 334 U. S. 323, 338.

Under the settled general rule established by this Court, this proviso of Section 12 is to be interpreted as a special withdrawal and exception of the class of veterans' preference employees whose efficiency ratings are "good" or better from the operation and operative effect of the general terms of the first clause. *McDonald* v. *United States*, 279 U. S. 20-21; *Cox* v. *Hart*, 260 U. S. 427, 435; *United States* v. *Morrow*, 266 U. S. 531, 534-535; *White* v. *United States*,

191, U. S. 545, 551; *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 242-246; *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 181; *Minis* v. *United States*, 15 Pet. 423, 445; see especially the application of the settled rule to the factor of length of service which was alone in issue between a nonveteran employee and veterans of the same classified tenure of employment, in *Hilton* v. *Sullivan*, 334 U. S. 323, 335.

This proviso of Section 12 is also to be regarded as the congressional creation of a class of veterans' preference employees who "shall", if they have the defined efficiency ratings of "good" or better, be retained in preference to all other competing employees without regard to tenure of employment and length of service as between veterans and nonveterans. *McDonald* v. *United States*, 279 U. S. 12, 20-21; *Springer* v. *Government of the Philippine Islands*, 277 U. S. 189, 207; *United States* v. *Babbit*, 66 U. S. 55, 61; *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 242, 246; *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 181; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36-37; Cf. especially the precise statement and application of this rule in *Hilton* v. *Sullivan*, 334 U. S. 323, 335.

In *McDonald* v. *United States*, 279 U. S. 12, 20-21, the Court said:

> "As a general rule, a proviso is intended to take a special class of cases out of the operation of the body of the section in which it is found. (cit. cases) But a proviso is not always limited in its effect to the part of the enactment in which it is found; it may apply generally to all cases within the meaning of the language used." (cit. cases)

In *United States* v. *Babbit*, 66 U. S. 55, 61, *supra*, in determining the effect of a proviso analogous in its relationship to the section in which it was found, this Court said:

> "We are of the opinion that the proviso referred to *is not* limited in its effect to the section in which it is

found, but that it was affirmed by Congress as an independent proposition and applies alike to all officers of this class." [Italics the Court's]

The plain language of the applicable proviso in Section 12, either under the general rule or as an independent proposition, has the effect of a mandate by Congress that any veterans' preference employee whose efficiency rating is "good" or better shall be retained in his position in preference to all other competing employees, without regard to the tenure of employment, the length of service, or the efficiency ratings of any other competing employee or employees. [Who are "all other competing employees", is discussed *infra*]

As many times stated by this Court in applying the general rule:

> "The office of a proviso is well understood. It is to except something from the operative effect, or to qualify or to restrain the generality, of the substantive enactment to which it is attached." *Cox* v. *Hart*, 260 U. S. 427, 425, *supra*.

> "The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generalities, or to exclude some possible ground of misinterpretation of it as extending to cases not intended by the legislature to be brought within its purview." *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 242, *supra*.

> "The general rule of law is, that a proviso carves special exceptions only out of the body of the act." *Schlemmer* v. *Buffalo R. & Ry. Co.*, 205 U. S. 1, 10.

> "The purpose of the added proviso was to carve out a special class of cases." *United States* v. *McElwain*, 272 U. S. 633.

In making the regulation or "ruling" relied upon by the Secretary, and attacked by the petitioners herein, the Commission granted superior subgroup A-2 retention prefer-

ence to nonveteran nonpreference employees with classified civil service tenure of employment. The Commission made this regulation or "ruling" frankly "according to tenure of employment". *The regulation thus gave effect to tenure of employment, the first of the four general terms of the first clause of Section 12.*

At the same time the Commission's regulation or "ruling" assigned inferior subgroup B-1 retention rights to veterans' preference employees whose efficiency ratings are "good" or better, and who were then credited with tenure of employment limited to the duration of the war and six months thereafter. The Commission made this regulation or ruling frankly "according to tenure of employment". *The regulation thus gave effect to tenure of employment, the first of the four general terms of the first clause of Section 12.*

This combination "ruling" purported to authorize, and actually resulted in, (1) the exclusion from duty and release of veterans' preference employees whose efficiency ratings are "good" or better, and (2) the continuous retention on active duty of nonveteran nonpreference employees in preference to the aforesaid veterans' preference employees whose efficiency ratings are "good" or better. *The regulation thus gave effect to tenure of employment, the first of the four general terms of the first clause of Section 12.*

But Congress, by the above proviso, created and effected a special withdrawal and exception of the class of veterans' preference employees whose efficiency ratings are "good" or better from the operation and operative effect of the general terms of the first clause of the section in which it is found. Under the settled rule this withdrawal and exception is inclusive of the general term *"tenure of employment"* as well as of the term *"length of service"*. Cases above cited.

2. As to the petitioner veterans, the regulation of the Commission was an unauthorized nullity.

Petitioners are admittedly members of the proviso-preferred, proviso-excepted class of veterans preference employees whose efficiency ratings are "good" or better, to whom the settled rule is applicable (R. 39, 50, 48). The regulation of the Commission which thus gave prohibited effect to the general term of tenure of employment violated the proviso and did not carry into effect the will of Congress as expressed in the statute. As stated by this Court:

> "The power of an administrative officer or board to administer a federal statute and prescribe rules and regulations to that end is not the power to make laws —for no such power can be delegated—but to carry into effect the will of Congress as expressed in the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statue, is a mere nullity." *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 143.

See, elaborating on the above: *Field* v. *Clark*, 143 U. S. 649, 692; *United States* v. *Eaton*, 144 U. S. 677, 687; *United States* v. *Grimaud*, 220 U. S. 506, 518; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 410; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 428; *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 537-538; *International Ry. Co.* v. *Davidson*, 257 U. S. 506, 514.

The Civil Service Commission regulation, applied herein, has not accorded any meaning appropriate to the first part of the second proviso of Section 12, in contravention of the well-established rule that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each. *Washington Market Co.* v. *Hoffman*, 101 U. S. 112, 115-116; *Ex parte Public National Bank*, 278 U. S. 101, 104.

The regulation thereby assumed the legislative power of altering, amending, and modifying this Act of Congress

by subtracting and eliminating the settled legal function of the applicable proviso which also contains an absolute command of the Congress. Administrative rulings cannot add to, or subtract from, the terms of an act of Congress. *United States* v. *Standard Brewery Co.*, 251 U. S. 210, 217-220; *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, 508. See, also, cases cited *supra*.

In *Hilton* v. *Sullivan*, 334 U. S. 323, 337, the Court's footnote 10 points out that the assignment of employees of classified (permanent) tenure to the "highest retention status" under Group A and the assignment of employees of limited tenures to lower retention status, as under Group B, was "regardless of veterans' preference and of efficiency ratings." In the *Hilton* case, all the employees involved were of classified tenure of employment and only the question of giving effect to "length of service" was presented and decided. Nevertheless, the Court's footnote 10 is indicative of its awareness of the disregard and violation inherent in both the 1943 and 1947 regulations of the Civil Service Commission insofar as they affect the retention preference rights of veterans of limited tenures.

Section 2 of the Act of 1944, in expressing and embodying the general policy and purpose of the Veterans' Preference Act of 1944, commands *inter alia* that preference in retention, in reinstatement, in appointment, etc., shall be given in civilian positions in the *unclassified* civil service as well as in the classified civil service.

This plain command in itself eliminates any apocryphal "construction carried over from the notion that the veterans' preference in retention under the priviso of Section 4 of the Act of August 23, 1912, applied only to the classified civil service, or that it applied only to veterans of classified civil service *status* or tenure of employment. See the many authorities cited and discussed *infra*, buttressing this all but self-evident conclusion.

Section 2 grants and prescribes preference in retention as an absolute grant to four primary classes of veterans,

therein defined. In Section 2 this grant is absolute—in no respect conditioned upon tenure of employment, length of service, or efficiency ratings.

In the second proviso of Section 12, *supra*, Congress further prescribes a single condition which expressly limits, to a special sub-class defined as veterans' preference employees whose efficiency ratings are 'good' or better", the absolute preference in retention previously granted to the four primary classes of veterans established in Section 2. This minimum of "good" efficiency ratings is the only condition prescribed by Congress in Section 2 with respect to the otherwise absolute preference in retention. And the condition is significantly prescribed as a part of the *proviso* which withdraws and excepts this preferred sub-class of veterans' preference employees from the operation and operative effect of the general terms of the first clause relating to tenure of employment as well as length of service.

As pointed out by this Court in connection with the interpretation of the proviso in *Hilton* v. *Sullivan*, *supra*, p. 335, the general term "military preference" in the first clause of Section 12 has a distinctly recognizable function "as between veteran and veteran" in the four successive primary grades of military preference established in Section 2. The general term "military preference" thus serves in the determination of relative retention preference as applied *between veteran and veteran*, in the same manner as tenure of employment, length of service, and efficiency ratings. But it is implicit in the interpretation adopted by this Court in *Hilton* v. *Sullivan* that none of the general terms of the first clause may be given any effect whatever as between veteran and nonveteran, but only as between nonveteran and nonveteran and as between veteran and veteran. *Hilton* v. *Sullivan*, 334 U. S. 323, 335. Thus, as between veterans and nonveterans, the proviso-preferred, proviso-excepted sub-class of veterans' preference employees whose efficiency ratings are "good" or better is in similar fashion withdrawn and excepted from the opera-

tive effect of any higher efficiency ratings possessed by any nonveteran nonpreference employee.

It boils down to this: So long as the efficiency ratings of a veterans' preference employee in a civilian position are "good" or better, that specified efficiency rating is the only condition prescribed by Congress for the absolute retention preference right of that veteran to be retained in that position "in preference to all other competing employees" (Proviso of § 12, *supra*).

3. Who are "All other competing employees?"

There is nothing esoteric about this phrase or any of the words in it. Nor is there anything ambiguous about the first part of the second proviso of Section 12.

In addition to embodying the absolute command and absolute retention preference contained in the 1912 Act, as pointed out by this Court in *Hilton* v. *Sullivan*, 334 U. S. 323, 338-339, and functioning as a special withdrawal and exception from the operative effect of the general provisions of Section 12 relating to tenure of employment and length of service, these plain words of the second proviso speak for themselves.

Under elementary principles the intention of the Congress is to be sought primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture. *Thompson* v. *United States*, 280 U. S. 420, 442. The words used by Congress in a statute are presumed to be used in their natural import and usual and most ordinary sense, and with the meaning commonly attributed to them. *Caminetti* v. *United States*, 242 U. S. 470, 485; *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 409-410.

"*All other competing employees*" thus refers to and means all competing employees "*other*" than preference employees. *United States* v. *Mescall*, 215 U. S. 26, 31, 32. This meaning is unnecessarily corroborated by the correla-

tive use of the words "competing nonpreference employees" in the next ensuing sentence of the second proviso of Section 12.

According to *Black's Law Dictionary, 3d Ed: "Compete.* To contend emulously, to strive for the position for which another is striving." The author cites a decision involving civil service positions. *People* v. *Chew,* 67 Colo. 394, 179 P. 812, 813.

"Competing" in its natural import and usual and most ordinary sense according to *Webster,* means "seeking or striving for the same thing, position or reward for which another is striving", to-wit, as here the position of Attorney, Grade P-3, occupied by each of the petitioners and in which each has been wrongfully displaced in favor of other employees "competing" for the position petitioners are striving to regain.

Bearing in mind the word *"other"* in this connection, any employee who is other than a veterans' preference employee whose efficiency ratings are "good" or better, and who is serving as an Attorney, Grade P-3, or who is ready and willing to be appointed or to serve in such position, falls within the natural meaning of other employees competing for the position of Attorney, Grade P-3, against these petitioners. *People* v. *Chew, supra.* Thus the term "all other competing employees used in Section 12 of the Veterans' Preference Act of 1944, as applicable in the instant case, refers to and means all employees other than veterans' preference employees whose efficiency ratings are "good" or better serving in positions of the same grade of Attorney (Grade P-3) as occupied by such veterans' preference employees, and also refers to and means all such nonveteran employees who are ready and willing to be appointed to or serve in such a position. All these employees fall within the natural import and usual and most ordinary sense of the words all other employees "competing" for such positions against the petitioner veterans.

The Court of Appeals rejected the foregoing elementary considerations and held that "the term 'competing employees' used in § 12 of the Act refers to employees competing within the bounds of such classifications as the Commission might establish by regulations" (R. 91); that "Those classifications [of the CSC regulation, § 20.3 *supra*] and the sub-groups into which they were divided . . . were approved by us in the *Hilton* case" (R. 91-92); and that "It results that since the appellant [petitioner] was a war service appointee with an efficiency rating of not less than "good", he was properly classified in group B and subgroup B-1, a status which gave him the highest preference for retention among all war service employees when a reduction in force became necessary." (R. 92).

These holdings were in error. They amount to a holding that the statute means that veterans' preference employees whose efficiency ratings are "good" or better shall *not* be retained in preference to all other competing employees, but shall be retained in preference to only those competing employees who have the same or an equivalent tenure of employment or who have a lower tenure of employment than such veterans' preference employees.

This would be giving effect to *"tenure of employment"*—one of the general terms of the first clause of Section 12—which is prohibited by the statute with respect to the proviso-preferred, proviso-excepted class of veterans.

It does not avail the Solicitor General to argue here on behalf of the Secretary:

> "The statute provides only that preference employees shall be retained in preference to 'competing employees'. It is certainly not unreasonable for the Commission to rule that men with classified civil service status are not competitors of temporary employees such as petitioners." (Mem. 5-6, No. 474).

If the Commission's "ruling" had been formulated and made applicable only with respect to the retention rights

of "men", in the sense of employees without veterans' preference in retention, and the Commission had not at the same time attempted to apply the ruling to cover veterans as well as nonveterans, justification for it might be both sincerely and soundly urged.

As above indicated, the proviso of Section 12 withdrew from the Civil Service Commission all authority to give any effect to tenure of employment in any situation involving the absolute right to be retained given to a veterans' preference employee whose efficiency ratings are "good" or better.

A fortiori, the Commission was without authority to evade the Congressional mandate by injecting any phase of *tenure of employment* into the natural import and most ordinary sense of the words "all other competing employees" used by Congress in the proviso. When the Commission did so here, it modified, altered, and changed in a radical fashion the natural import and most ordinary sense of the words as well as the meaning commonly attributed to them, thus attempting to usurp the power of legislation, and achieving a regulation which has the effect of nullity with respect to the rights of the proviso-excepted class of veterans. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue,* 297 U. S. 129, 143, *supra; Campbell* v. *Galeno Chemical Co.,* 281 U. S. 599, 610; *Field* v. *Clark,* 143 U. S. 649, 692, *supra,* and the many other cases above cited in this connection. As succinctly stated by this Court in *Campbell* v. *Galeno Chemical Co.,* 281 U. S. 599, 610, *supra:*

> "The limits of the power to make regulations are well settled. (cit. cases) They may not extend a statute or modify its provisions."

4. The administrative construction was incorrect and not binding on this Court.

Counsel for the Secretary argue (Mem. 5, No. 474) that:

"This 'contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion' is entitled to great weight." Citing *United States* v. *American Trucking Association*, 310 U. S. 532, 549.

But as said by this Court in *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725, 742:

> "Of course, this Court is not bound by administrative mistakes."

The inceptive attention and weight to be given to contemporaneous construction of a statute by administrative officers charged with its execution is a rule of interpretation, but it is by no means an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. However long continued by successive officers, such administrative construction must yield to the positive language of the statutes. *Houghton* v. *Payne*, 194 U. S. 88, 100; *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 330, 331; *Brewster* v. *Gage*, 280 U. S. 327 336; *Swendig* v. *Washington Water Power Co.*, 265 U. S. 322, 331; *Louisville & Nashville R. Co.* v. *United States*, 282 U. S. 740, 757, 759; *Texas & Pacific R. Co.* v. *United States*, 289 U. S. 627, 640; *United States* v. *Tanner*, 147 U. S. 661. See, also, *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 143, *supra;* and other cases above cited.

If the language is plain and the meaning clear, the duty of interpretation does not arise and the sole function of the courts is to enforce the statute according to its terms. *Caminetti* v. *United States*, 242 U. S. 470, 485; *United States* v. *Lexington Mill & Elevator Co.*, 282 U. S. 399, 409; *Dewey* v. *United States*, 178 U. S. 510, 520, 521; *Houghton* v. *Payne*, *supra*.

Under the positive language of Section 12, viewed in its significant relation with Sections 2 and 18 of the Veterans' Preference Act of 1944 and the provisions of earlier statutes broadened and in no respect narrowed by the Act of 1944, and embodied therein, *Hilton* v. *Sullivan,* 334 U. S. 323, 335-339, the respondent Secretary was required to retain these petitioner veterans in their positions as Attorneys, Grade P-3; and the Secretary's admitted failure so to do violated petitioners' legal rights under these applicable statutes.

This conclusion is confirmed and fortified by major factors embodied in the Act of 1944.

5. Petitioners have been and continue to be entitled to the full measure of the preference in retention granted under the proviso of §4 of the Act of 1912, as the rights thereunder are broadened and in no respect narrowed by the Act of 1944, and embodied in the Act of 1944.

The Court of Appeals held that: "Elder's [petitioners'] preference does not arise from the proviso of § 4 of the Act of 1912 because the application of that section is confined by its terms to those having classified civil service status." (R. 91).

This holding of the court below is in error for the following reasons:

Section 2 of the Veterans' Preference Act of 1944 commands that preference in retention shall be given in the unclassified civil service, as well as in the classified civil service. Under long established principles of statutory construction this forthright provision of Section 2 is to be regarded as a legislative recognition and declaration by Congress that the absolute retention preferences of veterans given by the proviso of § 4 of the Act of August 23, 1912, *applied in 1912 and still apply since 1944* with respect to veterans' preference in the *unclassified* civil service, as well as in the classified civil service, and has never been confined in application to the classified civil service or to

veterans of classified civil service status. *Weedin* v. *Chin Bow*, 274 U. S. 657, 668; *Blair* v. *City of Chicago*, 201 U. S. 400, 475; *Johnson* v. *Southern Pacific R. Co.*, 196 U. S. 1, 21; *Wetmore* v. *Markoe*, 196 U. S. 28, 76-77; *Cope* v. *Cope*, 137 U. S. 682, 688; *Bailey* v. *Clark*, 21 Wall. 284, 288; *United States* v. *Freeman*, 3 How. 556, 564-565; *Alexander* v. *Alexandria*, 5 Cranch, 1, 7; *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 277.

This proviso of §4 of the Act of 1912 is properly to be interpreted as an independent and substantive provision separate and distinct from the context of the section in which it is found, and as intended to apply generally to all cases, persons, or subject-matter within the meaning of the language used in the provision itself. *McDonald* v. *United States*, 279 U. S. 12, 20-21; *Springer* v. *Government of the Philippine Islands*, 277 U. S. 189, 207; *United States* v. *Babbit*, 66 U. S. 55, 61; *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 242, 246; *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 181; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36, 37.

Accordingly, this Court has interpreted the single sentence of the "1912 provision" as an independent and substantive provision separate from any context of the Section 4 in which it is found. *Hilton* v. *Sullivan*, 334 U. S. 323, 336. The Court said:

> "There is nothing ambiguous about this 1912 provision. It was an absolute command that no governmental department should discharge, drop, or reduce in rank any honorably discharged veteran government employee with a rating of 'good'. Length of service in no way qualified the preference given the veteran." Id. 336.

It is equally true in the instant case, if irrelevant to the issues in the *Hilton* case, that tenure of employment in no way qualified the preference given the veteran.

This Court has also held that the long standing retention preference of veterans given by Congress in the proviso of

§3 of the Act of August 15, 1876, and greatly strengthened by the proviso of §4 of the Act of August 23, 1912, have been broadened and in no respect narrowed by the Veterans' Preference Act of 1944, and embodied in the Act of 1944. *Hilton* v. *Sullivan*, 334 U. S. 323, 335-339.

It seems very clear that, whatever the scope of veterans' retention preference rights prior to the enactment of the Veterans' Preference Act of 1944, the absolute retention preference rights given by the proviso of §4 of the Act of August 23, 1912, must be deemed to have been broadened by §2 of the Veterans' Preference Act of 1944 to comprise the unclassified civil service and veterans' preference employees of non-classified civil service status, as well as the classified civil service and veterans of classified civil service status.

Pursuant to Section 18 of the Act of 1944 and the above determination of this Court, the Secretary of Agriculture was subject under the second proviso of Section 12 of the Act of 1944 to the embodied import and effect of the absolute 1912 command not to discharge, drop, or reduce in rank or salary any such veteran government employees as these petitioners. And this without reference to any other employees whether "competing" or otherwise and particularly without any interpretation of the language of Section 12 of the Act of 1944 which, as this Court has said:

> "• • • would mean that passage of the Veterans' Preference Act in 1944 narrowed the long-existing scope of veterans' preferences in case of reduction in force of government personnel." *Hilton* v. *Sullivan*, 334 U. S. 334 U. S. 323, 337.

The second proviso of Section 12 of the Act of 1944 is also seen to implement the meaning and all-comprehensive scope of the 1912 retention preference in the Government services recognized and declared by Congress in Section 2 of the Act of 1944, i. e. as embracing the *unclassified* civil

service and veterans of unclassified tenure or status. *Weedin* v. *Chin Bow*, and other cases *supra*.

In express terms Section 2 was an absolute command that the veterans preference in retention, reinstatement, appointment, etc., shall be given in civilian positions in the Government services, embracing the *unclassified* civil service, in all-comprehensive categories whether permanent, temporary, or emergency.

The Act of 1912 is accordingly to be read at the present time as though the broadening modification or amendment provided by Section 2 of the Act of 1944 had always been part and parcel of the Act of 1912 from the beginning, *United States* v. *LaFranca*, 282 U. S. 568, 574; and *Blair* v. *City of Chicago*, 201 U. S. 400, 475, where the Court said:

> " • • • the act of 1859 is to be read as if it had originally been in the amended form • • • 'As a rule of construction, a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended • • •' A statute which is amended is thereafter to be construed as if the amendment had always been there • • • ".

This Congressional recognition and declaration in Section 2 of the Act of 1944 effectually repudiates any phase of the construction or contention on the part of the respondent that the absolute retention preference given by the 1912 Act applied or applies only to the *classified* civil service and employees of related classified tenure of employment.

In passing, it may be noted that the only actual provision concerning civil service *tenure* or *status* was contained not in § 4 of the Omnibus Appropriation Act of August 23, 1912, but in § 5—or rather in a rider abortively designated as "Section 5" which finally failed of passage and does not appear in the Act as finally enacted, 37 Stat. 360, 413. H. Rept. No. 633, 62d Cong., 2d Sess., p. 14; S. Rept. No. 832, 62d Cong., 2d Sess., p. 7; H. Doc. 910, 62d Cong., 2d Sess., pp. 66-67.

In the premises, the facts alleged by petitioners show that the agency action of appellees in dropping and discharging petitioners was, and continues to be, in direct violation of their legal rights under the applicable statutes as interpreted by this Court, being in direct violation of the positive language of the veterans' provision in § 4 of the 1912 Act, *Wettre* v. *Hague*, 1 Cir., 168 F. 2d 825, 826, as well as of Sections 12, 2, and 18 of the Act of 1944—any regulations or administrative rulings of the Civil Service Commission to the contrary notwithstanding.

II.

Petitioners' Right to Preference in Reinstatement Under §2 of the Act of 1944 Was Violated October 27, 1947, and Since Wrongfully Denied. (No. 473)

1. Section 2 of the Act of 1944 designates, grants, prescribes, and defines five specific preferences which "shall be given" to veterans.

Section 2 of the Act of 1944 provides that: "In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions . . . preference shall be given" to four primary classes of veterans in the unclassified civil service as well as in the classified civil service, and in the comprehensive scope throughout the Government therein described and defined.

2. In enacting Section 2 Congress adopted the known and settled construction of its provisions.

In enacting the Veterans' Preference Act of 1944, Congress borrowed and embodied in the primary Section 2 the key and essential provisions of the veterans' statute of the State of New York—"provisions which had received in that state a known and settled construction before their enactment by Congress"—and accordingly, as further stated by this Court:

"• • • that [known and settled] construction must be deemed to have been adopted by Congress together with the text which it expounded, and the provisions must be construed as they were understood at the time in the State." *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 36.

In *Willis* v. *Eastern Trust & Banking Co.*, 169 U. S. 295, 307, the Court said:

"The resemblance between the provisions of the Massachusetts statute of 1860 and the act of Congress of 1864 is so remarkable, that it is evident that the latter were taken from the former. This being so, the known and settled construction, which these statutes had received in Massachusetts before the original enactment of the act of Congress, must be considered as having been adopted by Congress with the text thus expounded. (cit. cases) In *Metropolitan Railroad* v. *Moore*, just cited, where provisions of statutes of New York, regulating judicial procedure, had been incorporated by Congress, in substantially the same language, in the legislation concerning the District of Columbia, it was held that Congress must be presumed to have adopted with those provisions as then understood in New York and already construed by the courts of that State, and not as affected by the previous practice in Maryland or in the courts of the District of Columbia. • • • Similar opinions have been expressed in cases arising in other States under statutes differing in language, but having the same general purpose." (cit. cases)

See application of this rule in *McDonald* v. *Hovey*, 110 U. S. 619, 628-629; *James* v. *Appel*, 192 U. S. 129, 135; *Metropolitan R. Co.* v. *Moore*, 121 U. S. 558, 572; *Joines* v. *Patterson*, 274 U. S. 544, 549; *Henrietta Mining & M. Co.* v. *Gardner*, 173 U. S. 123, 130; Cf. *Carolene Products Co.* v. *United States*, 323 U. S. 18, 25.

The key provisions of the New York veterans' statute are identical with those in the New York Constitution, and

each have received the same construction of the same words therein reading:

> "* * * preference shall be given in appointment and promotion * * *"

Since the year 1900 these provisions have received the known and settled construction to the effect that the sentence italicized above, without more, "creates a preference of retention in employment so long as the positions exist to which they [veterans] have been appointed" and that "the right to appointment under such circumstances necessarily carries with it the right to continued employment as against other persons not so protected." *Stutzbach* v. *Coler* (1901), 168 N. Y. 416, 419-421, affg. 62 App. Div. 219, 70 N. Y. S. 901, 904-907; *Seeley* v. *Stevens* (1907) 190 N. Y. 158, 160, 166, 82 N. E. 1095, 1096-1098; *People ex rel Davison* v. *Williams* (1914), 213 N. Y. 130, 132, 107 N. E. 49, 50 (Cardozo, J.); *People ex rel Shields* v. *Scannell* (1900) 48 App. Div. 68, 73, 62 N. Y. S. 682, *McCloskey* v. *Willis*, 15 App. Div. 594, 44 N. Y. S. 682; *Meenaugh* v. *Dewey, District Attorney*, (1939) 17 N. Y. S. 2d 599, 601; McKinney's Cons. Laws of New York, Ann., Book 9, Civil Service Law, §§ 21, 22.

The aforesaid "construction * * * together with the text which it expounded" was affirmed and reiterated by the Court of Appeals of New York in the above cited cases, and is conveniently summarized in the leading case of *Stutzbach* v. *Coler, supra*, (1900) 62 App. Div. 219, 70 N. Y. S. 901, 904-907, where the court said:

> "The preference thus intended to be given must be regarded as substantial, and to carry with it every incident necessary to its complete protection and preservation. The preference given in appointment clearly involves in those entitled thereto a right over all other persons not similarly situated. This right, to be of any value whatever, must be a continuing right so long as the position exists to which the veteran is appointed. The purpose of giving him this preference

> in appointment was to furnish him with employment, and if thereafter he could be immediately discharged, and other persons, not preferred, retained in the position, it is manifest that the intent of the law, which seeks to prefer him, would be entirely defeated. The right to appointment under such circumstances carries with it the right to continued employment as against other persons not so protected."

Fourteen years later, Mr. Justice Cardozo, then speaking for the Court of Appeals of New York, said:

> "It is under that section of the statute that such veterans have been held entitled to preference when a reduction of personnel has become necessary. The determining consideration has been that, to make the preference as to appointment effective, it must be held to be a continuing one during the entire term of service. * * * the relator was entitled to reinstatement." *People ex rel Davison* v. *Williams, supra,* (1914), 213 N. Y. 130, 132, 107 N. E. 49, 50.

The courts of New York are not alone in this construction. In considering regulations based on substantially identical statutory provisions, the Supreme Judicial Court of Massachusetts said:

> " * * * they must be so construed as to give to the plaintiff the right to continuous employment in preference to those laborers who were not veterans, so long as there was work to be done of the kind for which he was employed, and as he was competent to perform that work." *Ransom* v. *City of Boston* (1906), 192 Mass. 299, 78 N. E. 481, 484, id. 193 Mass. 537, 79 N. E. 823, 824 (1907).

See, also, *Garvey* v. *City of Lowell* (1908), 199 Mass. 47, 50, 85 N. E. 182, 183; *State ex rel Castel* v. *Chisholm* (1925), 173 Minn. 485, 217 N. W. 681, 682; *State ex rel Tamminen* v. *City of Eveleth* (1933), 189 Minn. 229, 249 N. W. 184, 187; *Womsley* v. *Jersey City* (1898), 61 N. J. Law, 499, 39 Atl. 710.

Congress has significantly reinforced the aforesaid known and settled construction of the "*preference in appointment*" by expressly adding to it and including in Section 2, among the preferences which "shall be given" the specific preferences (1) In certification for appointment, (2) in appointment, (3) in reinstatement, (4) in reemployment, and (5) in retention—the last three of which, it has been seen, the New York courts had already found it necessary to recognize as existing in the New York statute and to enforce them although none of these preferences were enumerated or even mentioned in the New York statute.

In contrast to the confused constructions of Sections 2 and 12 of the Act of 1944 urged by respondent, the known and settled construction does not do violence to the plain language and natural import of the terms used by Congress in both Section 2 and Section 12, but makes the natural meaning effective and gives natural and logical sequence to the intention and purpose plainly expressed by the language of Section 2.

3. Section 2 embodies the general policy and purpose of the Act of 1944.

The known and settled construction serves to emphasize the dominant role of Section 2, already indicated by its primary position in the forefront of the Act and by the natural import of its terms. Section 2 not only designates, prescribes, and defines the initial scope of the five specific preferences named therein; it expresses and embodies the general policy and long existing purpose of Congress to grant substantial preference in continued employment in the Government service to the veterans of the Nation's wars and "since the beginning of the Republic to extend certain [*not uncertain and illusory*] benefits to those who have risked their lives in the armed forces during wartime." H. Rept. No. 1289, 78th Cong., 2d Sess., p. 2; 30 Cong. Record, p. 3502, 78th Cong., March 27, 1944; S. Rept. No. 907, 78th Cong., 2d Sess., p. 2.

4. The rule requires strict construction of exceptions to the general policy embodied in Section 2 of the Act.

Having thus expressed and embodied such general policy in Section 2, reinforced by the known and settled construction of its terms, the Congress was of course at liberty further to amend or define, extend or limit, each of the five specific preferences by additional provisions in this or other sections. Under existing law, however, each such additional provision is subject to

> "* * * the elementary rule that exceptions from a general policy which a law embodies should be strictly construed, that is, should be interpreted so as not to destroy the remedial processes intended to be accomplished by the enactment." *Spokane & Island R. Co.* v. *United States,* 241 U. S. 344, 350; *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission,* 286 U. S. 299, 311-312.

As hereinbefore indicated, Section 2 grants and prescribes the specific preference in retention as an absolute grant to four primary classes of veterans, therein defined. In Section 2 this grant is absolute—in no respect conditioned upon tenure of employment, length of service, or efficiency ratings.

In the second proviso of Section 12 of the Act of 1944 Congress further prescribes an exception to the general policy and absolute grant embodied in Section 2. By that exception Congress prescribes a single condition which expressly limits, to a special sub-class defined as "preference employees whose efficiency ratings are 'good' or better, the absolute preference in retention previously granted to the four primary classes of veterans established in Section 2.

This exception prescribed with respect to the absolute preference in retention granted by Section 2 expends itself by simply prescribing a limitation of the specific preference in retention to those veterans' preference employees whose efficiency ratings are "good" or better. Such ex-

ception and limitation is explicit, and may not be deemed to extend into unexpressed areas of tenure of employment or length of service. For the exception is subject to the strict construction requiring interpretation so as not to destroy the remedial processes intended to be accomplished by the enactment of Section 2.

The same interpretation is applicable to the specific preference in reinstatement.

The preference in reinstatement is one of the five specific preferences which Congress, designates, grants, prescribes "shall be given", and defines in scope by the provisions of Section 2. In Section 2 this grant of the preference in reinstatement is absolute—in no respect conditioned upon tenure of employment, length of service, or efficiency ratings.

In Section 5 Congress further provides:

> "In determining qualifications for examination, appointment, promotion, retention, transfer, or reinstatement, with respect to preference eligibles, the Civil Service Commission or other examining agency shall waive requirements as to age, height, and weight, * * * "

Section 5 thus purports to extend, rather than limit, the scope of the specific preferences in reinstatement, retention, and appointment so that they may partake in the particular benefits of the waivers as to age, height, and weight therein described.

Other than in Sections 2 and 5 *supra*, none of the terms "reinstatement" or reinstate occur anywhere else in the Veterans' Preference Act of 1944. When Congress further defined rights with respect to the preference in reinstatement in Section 5, it did so explicitly, using the Section 2 term *"reinstatement"* to indicate its intention further to define that specific preference. When Congress further dealt with and imposed the condition of a "good" efficiency rating upon the previously absolute preference in retention, Congress did so explicitly, using the unmistakable

term "*shall be retained in preference*". And in like manner Congress referred definitely to "certification" throughout in further dealing with and defining in scope the specific Section 2 preference "in certification for appointment.".

In Section 15 Congress dealt with eligibility for "*recertification and reappointment*". The Secretary insists that under these terms Section 15 "deals specifically with preference in reemployment" (Secy. Pet. 2) and, by assumption, that Congress intended by its use of "recertfication and reappointment" to delimit or eliminate rights to the specific preference in "reemployment" and also to the specific preference in "reinstatement" (Secy. Pet. 2, 8). This would mean, of course, to delimit or destroy the remedial processes intended to be accomplished by the enactment of these specific and absolute preferences by Section 2, as though they were one and the same in essential character, described in a surplusage of synonyms.

To acquiesce in such assumptions would be to presume that Congress was indulging in egregious inattention to the striking and essential differences of natural import and practical function existing between each and all of the respective terms meticulously used in this statute. [See the meanings and root-meanings attributed to these words in Webster's New International Dictionary, 2d Ed.]

In *Black's Law Dictionary*, 3d Ed. "*Reinstate*—To place again in a former state, condition, or office; to restore to a state or position from which the object or person had been removed. Cit. *Collins* v. *United States*, 15 Ct. Cl. 22. This is a distinctive meaning which under elementary principles we must assume that Congress was using by intention and not at random.

The instant case is seen to be one for the often expressed consideration, aiding interpretation, that if a given construction were intended—i.e. that veterans' rights to the specific preference in reinstatement granted under Section 2 are to be further defined, limited, or eliminated for all practical purposes under another section of the Act—it would have been easy for the Congress to have expressed

such intention in apt terms. *United States* v. *First National Bank of Detroit*, 234 U. S. 245, 262; *United States* v. *Hartwell*, 6 Wall. 383, 386. This the Congress has not done in this statute. Remedial rights and processes may not be disposed of by conjecture. *Thompson* v. *United States*, and other cases cited *supra*.

5. Petitioners' right to the specific preference in reinstatement under Section 2 was violated.

The Secretary argues that the Court of Appeals "reversed the decision below on the ground that Section 2 and the reduction-in-force regulations under Section 12 of the Veterans' Preference Act of 1944 created reemployment rights which were violated * * * when other attorneys classified in a lower subgroup than B-1, who had been released with [them] were reemployed" (*Secretary's Petition*, 5, No. 473), and that the court "applied the standards" of the reduction in force regulations under Section 12 "as the measure of veterans' reemployment rights" (Secy. Pet. 6).

On the contrary, in reversing the decision below, the Court of Appeals distinctly and explicitly ruled that it was the petitioners' rights under Section 2 of the statute that were violated (R. 93); that the undenied allegations charge wrongful discrimination against the petitioner veterans "in the reinstatement of non-veterans in October, 1947" (R. 94); and that on October 27, 1947, both of the petitioners were wrongfully denied reinstatement (R. 95). Moreover, the Court of Appeals ruled that the record does not show that petitioners' rights under the reduction-in-force regulations pursuant to Section 12 were violated (R. 92).

In view of these definite rulings, further descriptive references to the reinstated nonveterans as in a lower or subgroup B-2 classification under the regulations for retention may not be erected into a ruling that the reduction-in-force regulations under Section 12 created reemployment rights (Secy. Pet. 5), or into a ruling that any rights under such

regulations were violated (Secy. Pet. 5), or into a ruling that such reduction-in-force regulations under Section 12 are to be applied as the measure of veterans' reemployment rights (Secy. Pet. 6). Such descriptive references were manifestly calculated to avoid confusion between the *six* subgroup B-2 nonveterans who were *reinstated* in October, 1947, from the *eight* subgroup A-2 nonveterans alleged to have been *retained* since June 6, 1947, in wrongful preference to petitioners (R. 51). It is also to be noted that only the right to the specific preference in reinstatement was held by the court to be violated (R. 94, 95).

The undenied allegations above referred to are set out at length by the court in a four-page footnote to the opinion (R. 93-96), and are the same allegations also quoted at length by the Secretary of Agriculture in his motion to strike the same from the amended and supplemental complaint "on the ground that they are immaterial to the issues herein, impertinent and prejudicial" (R. 66-69). This motion to strike was not sustained (R. 72), and the objection was without merit.

These allegations fully advised the Secretary of the basis of the complaint against him, gave him actual notice of the issues, and afforded him full opportunity to defend thereon and justify the acts as innocent rather than discriminatory—which is exactly what he tried to do (R. 70-72). His statement here that "the only issues presented related to the validity of [petitioners'] separation" (Secy. Pet. 5) are therefore to be regarded as unfounded. *National Labor Relations Board* v. *Mackay Co.*, 304 U. S. 333, 350; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 228; *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 525.

Under the essentially identical provisions of the New York veterans' statute such allegations i. e. that nonveterans have been employed or reinstated in preference to a released veteran—have for more than forty years been repeatedly recognized as relevant and material as a decisive element in showing the violation of the veterans' rights to

such reinstatement under the statute. *People ex rel. Shields* v. *Scannell* (1900), 48 App. Div. 69, 73, 62 N. Y. S. 682, 683; *Meenaugh* v. *Dewey, District Attorney* (1939), 17 N. Y. S. 2d 599, 601.

The Secretary contends that Section 2 "does no more than enumerate the classes of persons who shall be entitled to the various employment preferencs" and that "The legislative history of the Act establishes beyond question that Section 2 was regarded as simply 'defining the various groups to whom preference [was] to be granted'." (*Secretary's Petition* in No. 473, p. 7).

The reports of the House and Senate committees and remarks of sponsors of the bill, cited by the Secretary, do not sustain his contention, which involves a construction of Section 2 contrary to its plain language and meaning and to the natural import of its terms. Reports of committees of the Congress, remarks of sponsors, and other matters incidental to legislative history cannot be resorted to for the purpose of construing a statute contrary to its plain language and meaning or to the natural import of its terms. *Ex parte Collett*, 337 U. S. 55, 61; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 83; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 163.

In *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 83, *supra*, the Court said:

> "In proper cases such reports [of committees of the Congress] are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms (cit. cases). Like other extrinsic aids to construction, their use is 'to *solve*, but not to *create* an ambiguity'. (cit. cases). Or, as stated in *United States* v. *Hartwell*, 6 Wall. 385, 386: 'If the language is clear it is conclusive. There can be no construction when there is nothing to construe'."

In *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 163, *supra*, the Court said:

"* * * and the rule is that expression by the legislature of an erroneous opinion concerning the law does not alter it."

And in *Ex parte Collett*, 337 U. S. 55, 61, this Court said:

"The short answer is that there is no need to refer to the legislative history where the language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of a wholly ambiguous significance may furnish dubious bases for inferences in every direction."

III.

The Eight Days Notice of Exclusion Was in Violation of §14 and Void.

The written notice dated and delivered May 29, 1947 (R. 6, 51-52, 78-80) gave only eight days notice of the proposed action of dropping and excluding plaintiffs from and after June 6, 1947. Such notice and the action taken pursuant thereto were accordingly illegal and *void ab initio* in violation of Section 14 of the Act of 1944 which mandatorily requires that the preference eligible "* * * shall have at least thirty days advance written notice for any such proposed action," to-wit, "furlough without pay" from and after June 6, 1947.

It is immaterial that respondent did not use in his notice of May 29, 1947, the specific expression "furlough without pay". The terms and expression respondent did use plainly expressed an unequivocal intention and purpose not only to place petitioners on furlough without pay, but to make such furlough effective permanently from and after June 6, 1947, designated in the notice as "your last day of active duty in your present position" (R. 8). Cf. *United States* v. *Wickersham*, 201 U. S. 390, 394-396.

IV.

By Reason of Attorney Positions Being Excepted From Competitive Status Since May 1, 1947, the Release of Petitioners Was in Violation of the Regulations for Reduction-in-Force.

1. Cooks, Attorneys, Chinese, Japanese, and Hindu interpreters, et al., were "excepted from the competitive service" by listing on Schedule A of the new Civil Service Rules effective May 1, 1947. (12 F. R. 2839, § 6.4.) On May 1, 1947, the petitioners each received a notice of "Conversion to Excepted Appointment (Schedule A-1-4)". (R. 78.)

2. Being excepted May 1, 1947, from such competitive status in the classified civil service, nonveteran Attorneys in such positions could not thereafter be classified in any superior subgroup A-2 under the effective regulations for reduction-in-force. (§ 20.3, 12 F. R. 2850)

3. The petitioners, as veterans' preference employees whose efficiency ratings are "good" or better, are therefore entitled *under such regulations* effective May 1, 1947, to be retained in preference to the eight nonveteran nonpreference Attorneys, thus erroneously designated A-2 and retained since June 6, 1947, in preference to petitioners (R. 50-51).

V.

Attorney Positions Have Remained in the Classified (Competitive) Civil Service During All Times Since the Issuance of Executive Order No. 8743 of April 23, 1941.

By the terms of the "Ramspeck" Act:

> "* * * the President is authorized by Executive order to cover into the classified civil service * * *"

such Attorney positions. [Act of November 26, 1940, c. 919, § 1, 54 Stat. 1211, 5 U. S. C. § 631(a).]

Expressly pursuant to the above statute, this explicit and specific authority only "to *cover*" was duly exercised by the President under Executive Order No. 8743 of April 23, 1941 (6 F. R. 2117); and by such exercise *the authority granted by the statute was plainly exhausted.*

We are not at liberty to assume that Congress, having by apt words explicitly granted only the authority to "*cover*", intended to grant the further, contrary, and repugnant authority to "uncover" such positions from the classified civil service, either upon a single occasion or repeatedly at the will of the executive. *United States* v. *First National Bank of Detroit,* 234 U. S. 245, 262; *United States* v. *Hartwell,* 6 Wall. 385, 386.

It would thus appear that such Attorney positions have legally remained in the classified civil service into which they were originally "covered" pursuant to the precisely designated and defined Congressional authorization to "cover"—that and no more.

The attention of this Court is invited to the Report of the *Committee on Civil Service Improvement* (1 Cum. Supp. pp. 456-457), and published as House Doc. No. 118, 77th Cong., pertinent excerpts from which are set out in the Supplement to this Brief, p. , *infra.* This Committee, made up of men of distinguished professional attainments, was appointed by the President January 31, 1939, and had a profound influence on the policy underlying the enactment of the "Ramspeck Act" of November 26, 1940, and the formulation of Executive Order 8743. This Report and the legislative history of the Ramspeck Act lead to the conclusion that the underlying intention, policy, and purpose of all concerned in the legislation and proximate administrative steps, were in accord as to the necessity that the legal positions of the Government be made a *career* service—permanent and not casual.

VI.

Petitioners Have Been Entitled to Classified Competitive Status Since August, 1944.

The Attorney position occupied by petitioner was among the positions "covered into the classified civil service" by Executive Order 3743 of April 23, 1941 (6 F. R. 2117) by express authorization of the Ramspeck Act of November 26, 1940, 54 Stat. 1211, 5 U. S. C. 631(a), and remained in the classified civil service at least until May 1, 1947, when Schedule A of the new Civil Service Rules included "Attorneys" among "those excepted from the competitive service to which appointments may be made without examination" (12 F. R. 2839).

Petitioner was one of 14,000 lawyers who took and one of 2,000 who passed the competitive civil service examinations, written and oral, given successively in September, 1942, and January, 1943, for Attorney positions in the classified civil service (R. 15-16, 56-57, 77-78). As a result petitioner was placed on the competitive register of Attorney eligibles for probational appointment established in February, 1943, and was officially notified thereof by letter dated February 11, 1943, signed by Ralph F. Fuchs, Executive Secretary of the Board of Legal Examiners (R. 56, 65), which reads in part as follows:

> "Dear Mr. Elder: [id. Mr. Furman].
>
> "I am happy to inform you that you have been included upon the register of 2000 eligibles for attorney positions which has resulted from the competitive examination of the Board of Legal Examiners in which you have participated. • • •
>
> "You may be approached by more than one agency of the Government as a result of your eligibility, • • •"

Petitioner was certified for probational appointment by the publication of this register in accordance with the provisions of Sec. 17.8 of the Regulations of the Board of Legal Examiners (R. 56-57). Sec. 17.8 *Registers of eligi-*

bles was adopted January 30, 1943 (8 F. R. 2141) under authority of Executive Order 8743 of April 23, 1941, and the Ramspeck Act of 1940, *supra*. Sec. 17.8 provides *inter alia* as follows:

> "Sec. 17.8 *Registers of eligibles.* * * * The publication of each register and of the supplements thereto shall constitute the certification of the eligibles included. The register together with pertinent information concerning the eligibles which the Board will supply shall be available in full to appointing officers, who may make selections for appointment from among those included, * * * all appointments to the positions and for the period covered by any register shall be from the register. * * *"

As required by Sec. 17.8, *supra*, petitioner was appointed from the register established in February, 1943 (R. 56-57). The approach, interview, and ensuing appointment of petitioner by respondent was made because of the certification of petitioner to respondent from the aforesaid register in accordance with the requirements of Sec. 17.8; and petitioner was appointed by reason of and pursuant to Sec. 17.8 and the register of 2,000 Attorney eligibles established and administered under Sec. 17.8 *Registers of eligibles*, in effectuation of the competitive purposes and procedures contemplated and provided for in Executive Order 8743 pursuant to the Ramspeck Act of 1940. (R. 57).

Petitioner satisfactorily completed his probationary year in such position of Attorney, Grade P-3, in the classified civil service and was officially notified in August, 1944, of his satisfactory completion thereof (R. 16, 50, 3) whereupon in normal course, classified (competitive) civil service status inured to petitioner as a matter of law by reason of the competitive examinations and procedures duly authorized and given effect with respect to him under the aforesaid Sec. 17.8 *Registers of eligibles*, Executive Order 8743, the Ramspeck Act of 1940, and the Civil Service Act of January 16, 1883, c. 27, 22 Stat. 403, 5 U. S. C. § 632 et seq. (R. 15-16, 55-57).

Executive Order No. 9506 of December 12, 1944 (1 CFR, Supp. of 1944, p. 103) provides as follows: [The entire text thereof is here set out.]

> "Hereafter no person shall be accorded a classified civil service status on the basis of his name having been reached on a civil service register unless he shall have been regularly selected for appointment from a certificate issued by the Civil Service Commission for probational appointment and shall have entered on duty pursuant to selection from such certificate."

In view of the date of Executive Order 9506, *supra*, the basis of petitioners' classified civil service status was more than currently adequate.

Bypassing the above situation, the Secretary's affiant asserts (R. 36) and the Court of Appeals holds (R. 90) that petitioner's status or tenure was governed by paragraph (g) (5 Code Regs. § 17.1 Cum. Supp. 1943) of the regulations of the Board of Legal Examiners, which the Court of Appeals said was the regulation in effect at the time petitioner was appointed and that: "It follows that throughout the period of his employment he was a war service appointee with tenure limited to the duration of the war and a period of six months thereafter" (R. 90-91). The Court of Appeals also said (R. 90) that the appointment of attorneys subsequent to March 16, 1942, was governed by said regulation. The following is the regulation adopted on March 16, 1942.

§ 17.2 *Procedure prior to the establishment of registers* of the Regulations of the Board of Legal Examiners, adopted March 16, 1942 (7 Federal Register, p. 2201), provides in pertinent part as follows:

> Sec. 17.2 *Procedure prior to the establishment of registers* (a) * * * (g) All appointments to attorney and law clerk trainee positions shall be for the duration of the present war and for six months thereafter, unless otherwise specifically limited to a shorter period, and shall be made subject to the satisfactory completion of a trial period of one year. Such appoint-

ments shall be effected under Executive Order 9063 of February 16, 1942, and persons thus appointed will not thereby acquire a classified Civil Service status."

On April 21, 1943, the Board of Legal Examiners collected and republished its previously adopted regulations in a sort of connected code, at 8 F.R. 5207-5208.

Duly included therein is Sec. 17.8 *Registers of eligibles,* pursuant to which petitioner was certified for probational appointment under the register of Attorney eligibles established February, 1943, from which petitioner was appointed (R. 56-57, 15). In this collection Sec. 17.8 is renumbered Sec. 17.6 *Registers of eligibles* and comprises the same text and terms as Sec. 17.8 *Registers of eligibles.*

Sec. 17.2 (g) *Procedure prior to the establishment of registers* is included in the collection as Sec. 17.1 (g), embodying the same text and terms as Sec. 17.2 (g) *Procedure prior to the establishment of registers,* and appearing without the subhead "*Procedure prior to the establishment of registers*".

The codification of April 21, 1943, §§ 17.1 to 17.7 was "issued under EO 8743" as authority (8 F.R. 5207).

Thus appearing again on April 21, 1943, in conjunction with Sec. 17.6 *Registers of eligibles* and the continuance in force of Executive Order 8743, it is apparent that the Board of Legal Examiners intended Sec. 17.1(g) and Sec. 17.2(g) *Procedure prior to the establishment of registers* to be applicable only to such procedure *prior* to the establishment of registers and did not intend the same to be applicable to procedure *subsequent* to the establishment in February, 1943, of the register upon which petitioner was included by the Board of Legal Examiners and by which register petitioner was certified for probational appointment and from which register petitioner was selected and appointed (R. 57).

Moreover, the above Sec. 17.1 (g) and Sec. 17.2 (g) *Procedure prior to the establishment of registers,* insofar as they purport to authorize employing agencies to make ap-

pointments limited to the duration of the war and for six months thereafter, were in each instance unauthorized and a nullity—

(1) because such War Service appointments were required by Executive Order 9063 of February 16, 1942, to be effected "solely by reason of any special procedures adopted under authority of this order" to-wit, Executive Order 9063;

(2) because by Executive Order 9063 "The United States Civil Service Commission [alone] is authorized to adopt and prescribe such special procedures as it [alone] may determine to be necessary in connection with the recruitment, placement, and changes of status of personnel for all departments * * *";

(3) because the Board of Legal Examiners, an autonomous body created and empowered by Executive Order 8743, was without authority to adopt and prescribe any such special procedures under Executive Order 9063 and possessed under Executive Order 8743 only the specific authority to determine regulations and procedures to effectuate the competitive purposes contemplated and provided for in Executive Order 8743 pursuant to the Ramspeck Act.

The Board of Legal Examiners was explicitly created and empowered by Executive Order 8743 to function as a responsible and autonomous body, obligated only to *consult* with the Civil Service Commission in regard to the Board's own determination and adoption of regulations, but in no way bound by any advice or orders of the Commission in any part of its duties. The Commission was not given any authority by the President with respect to such Regulations of the Board of Legal Examiners.

The Commission recognized this situation and expressly excepted and disqualified its own *War Service Regulations* from any application to or interference with the competitive examinations and competitive procedures being effectuated by the Board with respect to Attorney positions un-

der Executive Order 8743 and the Ramspeck Act—including the future regulations of the Board, such as Sec. 17.8 and 17.6 *Registers of eligibles, supra.*

Sec. 18.11 of the *War Service Regulations* adopted by the Civil Service Commission on March 16, 1943, expressly under authority of Executive Order 9063, prescribed in pertinent part:

> "Sec. 18.11 *Extent of regulations.*—(a) • • • (b) Nothing in these regulations shall be construed to affect any existing or future regulations promulgated by the Board of Legal Examiners pursuant to Executive Order No. 8743 of April 23, 1941."

The above Sec. 18.11 of the *War Service Regulations* remained in effect until 1946—long after August, 1944, when petitioner was officially notified of his satisfactory completion of his probationary year of service, whereupon classified (competitive) civil service status inured to him as a matter of law (R. 15-16, 55-57). Accordingly, Sec. 17.6 *Register of eligibles,* Executive Order 8743, the Ramspeck Act, and the procedures pursuant thereto were not subject to the *War Service Regulations* during the normal period of petitioner's competitive examination, certification for probational appointment, probational appointment, official notification of his successful completion of his probationary year, and acquisition of classified (competitive) civil service status.

It has been seen that the *War Service Regulations* were adopted by the Civil Service Commission pursuant to the authority of Executive Order No. 9063 of February 16, 1942, which expressly authorized the Civil Service Commission alone "to adopt and prescribe such special procedures as it may determine to be necessary" in such wartime emergency. The *Board of Legal Examiners* itself had no authority to adopt and prescribe any such special procedures under Executive Order No. 9063 as it erroneously presumed to assert in adopting and prescribing Sec. 17.2 *Procedure prior to the establishment of registers,*

supra. It had only the specific authority to determine regulations and procedures in such manner as to effectuate the competitive purposes contemplated and provided for in Executive Order No. 8743 pursuant to the Ramspeck Act. On the other hand, the Board of Legal Examiners was engaged in the performance of its legitimate and authorized functions when it adopted and prescribed Sec. 17.8 *Registers of eligibles of the Regulations of the Board of Legal Examiners*, adopted January 30, 1943 (8 F. R. 2141), pursuant to which petitioners were certified for probational appointment, appointed, and acquired classified (competitive) civil service status under the authority of the Ramspeck Act of 1940 and the Civil Service Act of 1883 (R. 55-57).

The significant points appear to be as follows:

I. The Board of Legal Examiners was without authority to determine, adopt, or prescribe any special procedures or regulations under Executive Order 9063 or to provide that any "appointments shall be effected under Executive Order 9063", all of which the Board of Legal Examiners erroneously assumed to do when it promulgated Sec. 17.2 *Procedure prior to the establishment of registers, supra*, on March 16, 1942. The said Sec. 17.2 was therefore a nullity.

II. The Board of Legal Examiners was likewise without authority in assuming to repromulgate, adopt, or prescribe the above Sec. 17.2(g) as Sec. 17.1(g) of the Regulations of the Board of Legal Examiners which the Board promulgated April 23, 1943, in the form of a connected code of previously adopted regulations wherein it used the same text and terms of the former Sec. 17.2(g), but omitted therefrom the subhead caption "*Procedure prior to the establishment of registers*" and promulgated Sec. 17.1(g) without this or any other subhead. As shown under the following points, the Board of Legal Examiners was equally without authority to adopt or prescribe either Sec. 17.2(g) or Sec. 17.1(g). Each and both of such regulations was thus a nullity and furnished no authority for the Sec-

retary's limitation of the petitioners' probational appointments to "War Service Indefinite Appointments" as he erroneously assumed to do under the said Sec. 17.1(g) of the Regulations of the Board of Legal Examiners (R. 36).

III. By the express terms of Executive Order 9063 it is provided:

> "1. The United States Civil Service Commission [alone] is authorized to adopt and prescribe such special proceedures as it [alone] may determine to be necessary * * * for all departments * * *"

IV. By Sec. 18.11 of the *War Service Regulations* adopted by the Civil Service Commission on March 16, 1943, expressly pursuant to E O 9063, *supra*, the Commission prescribed that:

> "SEC. 18.11 *Extent of regulations.*—(a) * * * (b) Nothing in these regulations shall be construed to affect any existing or future regulations promulgated by the Board of Legal Examiners pursuant to Executive Order No. 8743 of April 23, 1941."

This War Service Regulation Sec. 18.11 was still in effect until 1946—long after August, 1944, when petitioners were officially notified of their satisfactory completion of their probationary year of service, whereupon classified (competitive) civil service status inured to each of them as a matter of law (R. 15-16, 55-57).

V. By Executive Order No. 9063 it is also expressly provided:

> "2. Persons appointed *solely* by reason of any special procedures adopted under authority of this order to positions subject to the Civil Service Act and Rules shall not thereby acquire a classified (competitive) civil-service status, but, in the discretion of the Civil Service Commission, may be retained for the duration of the war and for six months thereafter." [Emphasis supplied]

(a) Petitioners were not appointed *solely*, or at all, by reason of the *War Service Regulations*, for the reason that in Sec. 18.11 thereof, *supra*, the Civil Service Commission explicitly withdrew the *War Service Regulations* from any application to matters connected with the province of the *Board of Legal Examiners*, i.e., recruitment and appointments to Attorney positions and in the classified civil service and matters related thereto.

(b) Sec. 17.2(g) and Sec. 17.1(g), which in terms purported to authorize employing agencies to make appointments limited to the duration of the war and six months thereafter, were unauthorized and a nullity because such appointments were by Executive Order 9063 required to be effected "*solely* by reason of ... special procedures adopted under authority of this order", E O 9063, and in addition the Civil Service Commission itself alone was expressly designated and "authorized to adopt such special procedures" under E O 9063.

(c) Since the President in E O 9063 deemed it advisable and saw fit explicitly to restrict to the *Civil Service Commission*, itself and alone, the authority to adopt and prescribe special procedures, which would confer authority on employing agencies authority to limit appointments, made *solely* by reason of such special procedures, to the duration of the war and six months thereafter, it is not to be presumed that the President intended to clothe any other Commission, officer, or Board such as the autonomous Board of Legal Examiners, with such comprehensive authority to adopt special procedures which would in turn authorize employing agencies to limit probational appointments in the classified civil service to the duration of the war and six months thereafter.

(d) If the Board of Legal Examiners assumed to adopt Sec. 17.2(g) or Sec. 17.1(g) of its regulations partly under E O 8743 and partly under E O 9063, this would not comply with the President's requirement in E O 9063 that only

appointments effected *solely* by reason of such special procedures adopted by the Commission under authority of E O 9063 may, in the discretion of the Commission, be limited to the duration of the war and six months thereafter. Sec. 17.2(g) and Sec. 17.1(g) are not thus to be salvaged from nullity.

(e) The function of effecting limited appointments to Attorney positions in the classified civil service is foreign to and in contravention of the essential purpose and policy of the Ramspeck Act and Executive Order No. 8743, which contemplate and authorize in a very particular sense procedures designed to qualify competitive applicants for probational appointment and classified (competitive) civil service status, on a par with the status enjoyed by other Federal employees.

VI. Executive Order No. 9358 of July 1, 1943, provided that: "Subject to the provisions of this order, Executive Order No. 8743 as amended shall remain in effect." E O 9358 also provided that "until further order the administration of the civil service laws in their application to attorney positions in the classified civil service and to the incumbents of such positions shall vest in the Civil Service Commission. The Commission shall have authority to determine the regulations and procedures governing the recruitment and examination of applicants for attorney positions and the selection, appointment, promotion, and transfer of attorneys in the classified civil service . . . "

(a) It does not appear in the Federal Register or elsewhere that the Civil Service Commission ever adopted any special procedures or regulations with respect to Attorneys or Attorney positions at any time between September, 1942, and August 1944, when petitioners presumably acquired competitive status. Nor does it anywhere appear that the Commission officially adopted the Regulations of the Board of Legal Examiners or officially prescribed any

authority for the utilization of such regulations as regulations of the Commission or otherwise.

(b) It vaguely appears from the averments on behalf of the Secretary that an obscure subdivision, unknown to the Federal Register, or any duly adopted regulation, i. e., a "Legal Examining Section" of the Commission, assumed to act under the above Sec. 17.1(g) of the Regulations of the Board of Legal Examiners and assumed to "authorize" the Office of the Solicitor of the Secretary of Agriculture to appoint each of these petitioners to a * * *

> "War Service Indefinite Appointment pursuant to section 7, Regulation 1 of the Regulations of the Board of Legal Examiners, which regulations were adopted and applied by the Legal Examining Section when it took over the functions of the Board of Legal Examiners as of July, 1943" (R. 36)

Surely, in a Government of laws, subordinates and personnel clerks of a subdivision of the Civil Service Commission and of an executive Department, assuming to perform official acts under regulations shown to be devoid of appropriate authorization, cannot successfully clothe their unauthorized administrative acts with such *de facto* validity as to set at naught the long considered purpose and carefully determined policy which minds of distinction have sought to effectuate for their professional younger brethren through the Ramspeck Act of 1940 and the Civil Service Act of 1883.

The statutes, Executive orders, regulations, and other functional material relevant to the matter of competitive status are set out in the Supplement hereto. Such functional material serves to disclose the competitive purpose and effect of the action of Congress and the Executive in the years before September, 1942, when the competitive examination of these petitioners and 14,000 others was held, before January 30, 1943, when Sec. 17.8 *Register of* [Attorney] *eligibles* was adopted, extending into Febru-

ary, 1943, when petitioners were placed on the register of Attorney eligibles and thereby certified for probational appointment to Attorney positions in the classified civil service (R. 55-57). These considerations leave open no other conclusion than that the Congressional and Executive intention and applicable authority required probational appointment of petitioners to these Attorney positions in the classified civil service, and that respondent was without authority to impose a war service limitation or any other limitation upon such probational appointment. Such intention and authority required that, immediately upon official notification of the satisfactory completion of their probationary year of service in such positions in the classified civil service, classified (competitive) civil service status should forthwith inure to each of the petitioners as a matter of law.

Under the circumstances the Secretary was in error in attempting to limit the petitioners' probational appointments to "War Service Indefinite Appointments" (R. 36) pursuant to inapplicable and/or unauthorized regulations and procedures, and his action in that connection was consequently unauthorized and a nullity. The grounds upon which the respondent acted were not those upon which his action can be sustained and an order cannot be sustained if an agency has misconstrued the law. *Securities & Exchange Commission* v. *Chenery*, 318 U. S. 80, 94-95.

It is respectfully submitted that:

Each of the petitioners was entitled to probational appointment in an Attorney position in the classified civil service by reason of the competitive examinations and competitive procedure duly authorized and given effect with respect to him under the Civil Service Act of 1883, the Ramspeck Act of November 26, 1940, Executive Order No. 8743 of April 23, 1941, and Sec. 17.8 and Sec. 17.6 *Registers of eligibles* of the Regulations of the Board of Legal Examiners adopted January 30, 1943, repromulgated in compendium April 23, 1943. (R. 55-57).

Petitioners were each placed on the register of eligibles established in February, 1943, were certified for probational appointment by publication of the register, and were appointed from the register by respondent by reason of the authority aforesaid. (R. 56-57).

Under such authority the respondent was legally required to make and must be deemed to have made a probational appointment of each of the petitioners from the register of Attorney eligibles under which petitioners were mandatorily certified (§ 17.8, §17.6, *supra*) for probational appointment to such Attorney positions in the classified civil service.

Each of the petitioners successfully completed his probationary period of one year in August, 1944, was officially notified thereof by respondent, and during all times thereafter a classified (competitive) civil service status or permanent civil-service tenure of employment inured to each of the petitioners as a matter of law. Effect is thus given to the steps prescribed in the Civil Service Act and implementing Executive orders and regulations. (R. 16, 50, 3).

Classified (competitive) civil service status, if available to the petitioners, would add the effect of this factor of civil service tenure of employment in any determination of petitioners' relative retention preference with respect to other veterans under the first clause of Section 12 of the Veterans' Preference Act of 1944. *Hilton* v. *Sullivan*, 334 U. S. 323, 335. But it would not affect the absolute retention preference possessed by the petitioners as veterans' preference employees whose efficiency ratings are "good" or better, over all nonveteran nonpreference employees without regard to tenure of employment.

Whether or not possessed of classified (competitive) civil service status, each of the petitioner veterans was wrongfully denied his statutory right to preference in retention and has been wrongfully excluded from duty and pay in his position of Attorney, Grade P-3, during all times since June 6, 1947 (R. 50-51, 14).

Relief calls for "an adaptation of court procedure to a remolding of the situation as nearly as it may be to what it should have been initially." *Addison* v. *Holly Hill Fruit Products Co.*, 322 U. S. 607, 620.

A case is presented for the exercise of the power of the District Court to restore each of the petitioners to the status of active employment in his position as of June 5, 1947, the day these suits were brought, *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1, 17, with all benefits, privileges, and emoluments that would normally flow and accrue to him from continuity of service on active duty with pay during the period of his illegal exclusion therefrom after June 6, 1947, to and until his restoration to such active duty. (R. 22). *United States* v. *Wickersham*, 201 U. S. 390, 394-396.

CONCLUSION.

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed insofar as it reverses the judgments of the District Court.

Insofar as it fails to afford appropriate relief to petitioners, the judgment of the Court of Appeals should be set aside and the causes remanded to the District Court with direction for such further relief as this Court may deem just and proper.

Respectfully submitted,

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Robert D. Elder,
Greene Chandler Furman,
Attorneys for Petitioners.

March 19, 1951.

SUPPLEMENT TO BRIEF.

The proviso of § 4 of the Act of August 23, 1912, § 4, 37 Stat. 413, 5 U. S. C. A. § 648, provides as follows:

> *Provided*, That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary.

This proviso immediately follows the provisions quoted herewith:

> Sec. 4. The Civil Service Commission shall, subject to the approval of the President, establish a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia * * * Copies of all records of efficiency shall be furnished by the departments and independent establishments to the Civil Service Commission for record in accordance with the provisions of this section: *Provided* (*et seq. supra*) * * *

The Veterans' Preference Act of June 27, 1944, 58 Stat. 387, 5 U. S. C., Supp. V, §§ 851-869, provides in pertinent part as follows:

> Sec. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; * * * preference shall be given to * * * (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, * * * and have been separated therefrom under honorable conditions.
>
> * * * * * * * * * * * *
>
> Sec. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employ-

ees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: * * * *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees * * *.

* * * * * * * * * *

Sec. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

Pertinent provisions of the Civil Service Commission regulations for reductions-in-force (5 Code Fed. Regs. § 20.3, Supp. 1947) are set forth *supra* under *Statement*, pp. 8-9.

* * * * * * * * * *

The Civil Service Act of January 16, 1883, c. 27, 22 Stat. 403 et seq., 5 U. S. C. § 632 et seq., provides in pertinent part as follows:

SEC. 7. No officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the classes of employees existing on January 16, 1883, or that may thereafter exist, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith. Nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by * * *

* * * * * * * * * *

SEC. 2. * * *

Second. Among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

First. For open, competitive examinations for testing the fitness of applicants for the public service classified on January 16, 1883, or thereafter, or to be classified hereunder. Such examinations shall be practical in their character, and so far as may be shall relate to those matters which shall fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed.

* * * * * * * * * * *

Fourth. There shall be a period of probation before any absolute appointment or employment aforesaid.

Section 1 of the (Ramspeck) Act of November 26, 1940, c. 219, Title I, § 1, 54 Stat. 1211, 5 U. S. C. § 631a, provides in pertinent part as follows:

SEC. 1. Notwithstanding any provisions of law to the contrary, the President is authorized by Executive order to cover into the classified civil service any offices or positions in or under an executive department, independent establishment, or other agency of the Government. * * *

Executive Order No. 8743 of April 23, 1941, *Extending the Classified Civil Service* (1 CFR, Cum. Supp., pp. 927-929) provides in pertinent part as follows:

By virtue of the authority vested in me by section 1 of the act of November 26, 1940, entitled "'Extending the Classified Executive Civil Service of the United States'' (54 Stat. 1211), by the Civil Service Act (22 Stat. 403), and by Section 1753 of the Revised Statutes of the United States, it is hereby ordered as follows:

Section 1. All Offices and positions in the executive civil service of the United States except (1) those that are temporary, (2) those expressly excepted from the provisions of the said act of November 26, 1940, (3) those excepted from the classified service under Schedules A and B of the Civil Service Rules, and (4) those which now have a classified status, are hereby covered into the classified civil service of the Government.

SEC. 2. * * *

SEC. 3. (a) Upon consideration of the report of the Committee on Civil Service Improvement (House Document No.

118, 77th Congress) * * * it is hereby found and determined that the regulations and procedures hereinafter prescribed in this section with respect to attorney positions in the classified civil service are required by the conditions of good administration.

(b) There is hereby created in the Civil Service Commission (hereinafter referred to as the Commission) a board to be known as the Board of Legal Examiners (hereinafter referred to as the Board). The Board shall consist of the Solicitor General of the United States and * * *.

(c) It shall be the duty of the Board to promote the development of a merit system for the recruitment, selection, appointment, promotion, and transfer of attorneys in the classified civil service in accordance with the general procedures outlined in Plan A of the report of the Committee on Civil Service Improvement appointed by Executive Order No. 8044 of January 31, 1939.

(d) The Board, in consultation with the Civil Service Commission, shall determine the regulations and procedures under this section governing the recruitment and examination of applicants for attorney positions, and the selection, appointment, promotion, and transfer of attorneys in the classified service.

(e) The Commission shall in the manner determined by the Board establish a register or registers of eligibles from which attorney positions in the classified service shall be filled: *Provided*, That any register so established shall not be in effect for a period longer than one year from the date of its establishment. Upon request of the Board, the Commission shall designate appropriate regions or localities and appoint regional or local boards of examiners composed of three persons approved by the Board, within or without the Federal service, to interview and examine such applicants as the Board may recommend.

(f) The number of names to be placed upon any register of eligibles for attorney positions shall be limited to the number recommended by the Board; and such registers shall not be ranked according to the ratings received by the eligibles, except that persons entitled to veterans' preference as defined in section 1 of Civil Service Rule [illegible] shall be appropriately designated therein.

(g) • • •

(h) • • •

(i) Any position affected by this section which is vacant after June 30, 1941, may be filled before available registers have been established pursuant to this section only by the appointmnt of a person who has passed a non-competitive examination prescribed by the Commission with the approval of the Board, and such person after the expiration of six months from the date of his appointment shall be eligible for classified civil-service status upon compliance with the provisions of section 6 of Civil Service Rule II, other than those provisions relating to examination.

(j) The incumbent of any attorney position covered into the classified service by section 1 of this order may acquire a classified civil-service status in accordance with the provisions of section 6 of Civil Service Rule II: *Provided*, That the non-competitive examination required thereunder shall be prescribed by the Commission with the approval of the Board.

(k) • • •

(l) The Civil Service rules are hereby amended to the extent necessary to give effect to the provisions of this section.

Part 17—*Regulations of the Board of Legal Examiners*, adopted January 30, 1943 (8 Federal Register, p. 2141) provides as follows:

Registers; rights of eligibles who enter military service.

Section 17.8 *Registers of eligibles* and 17.9 *Rights of eligibles who enter military service* are added as follows:

SEC. 17.8 *Registers of eligibles.* Registers of eligibles for attorney positions shall contain such numbers, be applicable to such positions, and be effective for such periods as the Board shall determine and announce. The publication of each register and the supplements thereto shall constitute the certification of the eligibles included. The register together with pertinent information concerning the eligibles which the Board will supply shall be available in full to appointing officers, who may make selections for

appointment from among those included, subject to the Board's minimum experience requirements for particular grades of positions and with the exception that the Board may from time to time suspend the certification of eligibles from particular States in order to give effect to the principle that appointments shall so far as practicable be distributed among the States in proportion to population. Except as to individuals of whom the Board is advised by appointing officers in advance of publication of the register, all appointments to the positions and for the period covered by any register shall be from the register. The selections from any register shall be communicated immediately by the appointing agencies to the Board. The Board, immediately upon entering its approval of proposed appointments, will remove the names of the appointees from the register. The Board may from time to time add to a register others who have been found unavailable for appointment, and may at any time suspend or cancel the eligibility of an individual included upon a register for cause arising either before or after his original certification. In case the life of a register is extended, the eligibles remaining on it may as a condition of continued eligibility be required to furnish supplementary statements of qualifications and experience.

SEC. 17.9 *Rights of eligibles who enter military service* (a) An applicant whose score upon a written examination confers eligibility for oral examination shall be entitled to take a qualifying oral examination or at the option of the Board to compete in a competitive oral examination in process at the time of his request, and, if recommended by the examining committee, to be included for one year among the eligibles for positions in the grade or grades for which the original written examination was given. • • •

(E. O. 8743, 6 F. R. 2117)

BY THE UNITED STATES CIVIL SERVICE COMMISSION,
H. B. MITCHELL,
President.

(SEAL)
January 30, 1943.

(F. R. Doc. 43-2582; Filed February 16, 1943; 1:41 P. M.)

Section 17.2 *Procedure prior to the establishment of*

registers of the *Regulations of the Board of Legal Examiners*, adopted March 16, 1942 (7 *Federal Register*, p. 2201), provides in pertinent part as follows:

SEC. 17.2 *Procedure prior to the establishment of registers* (a) * * * (g) All appointments to attorney and law clerk-trainee positions shall be for the duration of the present war and for six months thereafter, unless otherwise specifically limited to a shorter period, and shall be made subject to the satisfactory completion of a trial period of one year. Such appointments shall be effected under Executive Order 9063 of February 16, 1942, and persons thus appointed will not thereby require a classified Civil Service status.

Executive Order No. 9063 of February 16, 1942 (1 CFR, Cum. Supp. pp. 1091-1092) provides in pertinent part:

* * *

1. The United States Civil Service Commission is authorized to adopt and prescribe such special procedures as it may determine to be necessary in connection with the recruitment, placement, and changes of status of personnel for all departments * * *

2. Persons appointed solely by reason of any special procedures adopted under authority of this order to positions subject to the provisions of the Civil Service Act and Rules shall not thereby acquire a classified (competitive civil-service status, but, in the discretion of the Civil Service Commission, may be retained for the duration of the war and for six months thereafter.

Section 18.5 of the *War Service Regulations* (2 CFR, Cum. Supp. p. 1457) adopted March 16, 1942, by the Civil Service Commission, provides in pertinent part as follows:

SEC. 18.5 *Appointment*—(a) * * * (b) *Status of appointees.* Persons appointed under these regulations will not thereby acquire a classified (competitive) civil-service

status. Unless otherwise specifically limited such appointments may be for the duration of the present war and for six months thereafter.

Section 18.11 of the *War Service Regulations* (2 CFR, Cum. Supp. p. 1463) adopted March 16, 1942, by the Civil Service Commission, provides in pertinent part as follows:

SEC. 18.11 *Extent of regulations.*—(a) * * *. (b) *Regulations of Board of Legal Examiners.*—Nothing in these regulations shall be construed to affect any existing or future regulations promulgated by the Board of Legal Examiners pursuant to Executive Order No. 8743 of April 23, 1941.

Pertinent excerpts from the Report of the *Committee on Civil Service Improvement*, appointed by the President in Executive Order No. 8044 of January 31, 1939 (1 Cum. Supp. pp. 456-457) and published as *House Document No. 118, 77th Congress*, are for convenience set out as follows:

(p. 1) 1. We recommend that all positions in the professional, scientific, and higher administrative services which are designated in Sections 1 (c) and 2 (a) of Executive Order 8044, with such exceptions as may be approved by the Civil Service Commission, be placed under the provisions of the Civil Service Act by Executive order; and by consequence under the Retirement Act of 1920, as amended.

2. We recommend that the President include in the competitive classified service all other professional, scientific, and higher administrative positions (as defined by Executive Order 8044), formerly exempt by statute but which may now be included in the classified service by executive order under the act of November 26, 1940 * * *.

(p. 2) 7. With respect to attorney positions, we recommend that the President by Executive order extend the Civil Service Act to those attorney positions which were affected by Executive Order 8044 and to those included within the authority granted him under the act of Novem-

ber 26, 1940, with such exceptions as the Civil Service Commission may approve.

However, two plans of procedure with respect to the induction of attorneys into the Government service are proposed, Plan A and Plan B. The plans differ on two points, as indicated below. Plan A recommends an unranked register of eligible candidates for attorney positions; rejects as unsatisfactory the present civil service system; asserts that attorney positions present a unique problem in the professional service which must be solved individually rather than by application of a general formula. It points out that written examinations are not trustworthy guides to capacity for many of the tasks to be performed; that present certification procedure makes it extremely difficult for the candidate to exercise any choice as to the department or agency in which he will work; and finally that until the Civil Service Commission is better acquainted with the attorney problem through practical experience the entrance into the merit system should not be confused with civil-service procedures thought to be inadequate to the attorney problem.

(p. 15) * * * attorneys are the principal class of employees affected by Executive Order 8044. * * * Two separate civil-service systems are unthinkable. * * *

(p. 29) The attorney positions total well over half of the positions withheld from the classified civil service by Executive Order No. 8044 (table VI, supra, p. 33).

The Committee is in entire accord as to the necessity that the legal positions of the Government be made a career service. * * *

(p. 31) Many recommendations from sources entitled to the greatest respect have urged a prompt inclusion of the attorney positions within the merit system. These include * * *